

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES HOLLOWAY)	
Claimant)	
VS.)	
)	Docket No. 159,964
KLAVER CONSTRUCTION COMPANY)	
Respondent)	
AND)	
)	
CNA INSURANCE CARRIER)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appeals from a June 18, 1996, Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument December 5, 1996.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, William A. Wolff of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Michael T. Harris.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Respondent and claimant entered into a settlement agreement on January 17, 1994. The sole issue on appeal in this case is the extent, if any, of liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the medical evidence presented by the respondent does not meet its burden of establishing the extent of Fund liability and the Award by the Administrative Law Judge should be affirmed.

Pursuant to K.S.A. 1990 Supp. 44-567, the Workers Compensation Fund has liability for benefits in certain cases where an employer knowingly employs or retains a handicapped employee. If that employee subsequently sustains an injury which would not have occurred but for the preexisting impairment, the Fund may be liable for all of the benefits. If the injury would have resulted without regard to the preexisting impairment but the preexisting impairment contributes to the resulting disability, the Fund may be liable for a portion of the benefits. In this case, respondent argues that the Fund should be liable for a portion of the benefits.

Claimant has sustained several injuries to his right knee. He also sustained an injury to his right shoulder from a fall which occurred when the brace on his knee caught on a chair at home.

The first injury to claimant's right knee occurred in August or September of 1990 when claimant fell onto his knee at work. Claimant's supervisor was present and respondent had knowledge of the injury. Claimant testified that after the injury and after a few days off, the knee kept swelling up and there were times when he would have to stop working.

Claimant suffered a second accident on April 1, 1991, when he stepped out of his truck and his right knee twisted and popped. Claimant again reported the injury. On this occasion he was referred for treatment by Dr. Duane Murphy. Dr. Murphy performed surgery for a medial meniscus tear. Claimant suffered a third injury on October 20, 1991, while at home. His leg brace caught on what claimant described as a door plunger. When claimant fell, he reinjured his right knee and injured his right shoulder.

To establish its case against the Fund, respondent provided Dr. Murphy's treatment records for review by Dr. Ely Bartal. From those records, Dr. Bartal expressed the opinion that 50 percent of claimant's disability preexisted the April 1, 1991, injury and 50 percent followed that injury. The Appeals Board does not, however, find Dr. Bartal's opinions convincing. First, it appears that in context Dr. Bartal is apportioning liability for the knee injury only and does not intend to include the shoulder. In addition, Dr. Bartal, who did not

see claimant until after claimant's second injury, based his conclusion on his opinion that claimant had both a tear to the meniscus and damage to the anterior cruciate ligament before the second injury. Dr. Murphy, the treating physician, attributed the cruciate ligament tear to the fall at home, not to either of the injuries at work. Dr. Bartal acknowledged he cannot give an opinion as to the extent of the impairment claimant suffered. In context with the record as a whole, the Board considers Dr. Bartal's fifty-fifty apportionment opinion too speculative to support an award against the Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated June 18, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William A. Wolff, Lenexa, KS
Michael T. Harris, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director